



December 2, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

RE: Response to Inquiry from FCC Staff
Gray Television License, LLC, MB Docket No. 16-293

Dear Ms. Dortch:

On behalf of Gray Television Licensee, LLC (“Gray”), I hereby provide responses to questions forwarded by Mr. Evan Baranoff via e-mail on November 21, 2016. As discussed in Gray’s Petition for Special Relief (the “Petition”), Gray’s WZAW-LD is the Fox affiliate for the Wausau-Rhineland Designated Market Area (“DMA”). Gray simulcasts the WZAW-LD programming on one of its three digital subchannels for WSAW-TV. Granting the Petition will ensure that DIRECTV and DISH Network can secure the necessary copyright license to retransmit WSAW-TV’s Wisconsin-based and Wisconsin-focused programming in Ashland and Iron Counties, including providing a copyright license for the programming from WSAW-TV’s Fox-affiliated digital subchannel.

1. Explain the legal authority (both under Communications and Copyright laws) that would allow satellite carriage of the programming on WZAW-LP (Fox) if a market modification for WSAW was approved.

Gray is not requesting that the FCC allow satellite carriage of the Fox-affiliated primary program stream of low power station WZAW-LD. Instead, Gray is requesting that the FCC modify the market of full power, commercial television station WSAW-TV. Upon grant of its Petition, Gray would elect retransmission consent for WSAW-TV in Ashland and Iron Counties.¹ Gray then would

¹ Amendment to the Commission’s Rules Concerning Market Modification, *Report and Order*, 30 FCC Rcd 10406, 10427 (2015) (“*STELAR Order*”) (“[W]hen a station’s market is modified for purposes of satellite carriage, then the station is entitled to elect either retransmission consent pursuant to Section 325 or mandatory carriage pursuant to Section 338 with respect to the new community or communities added to its market by the modification.”).

enter into separate agreements with DIRECTV and DISH Network (or amend its existing agreements with each satellite operator) to grant consent for both operators to retransmit the primary channel for WSAW-TV (CBS) and/or the station's digital subchannel (Fox) to each operator's subscribers in Ashland and Iron Counties, subject to the technical limitations of the operator's spot beam and subject to any restrictions imposed by Gray's programming providers. As Gray has pledged to both DIRECTV and DISH Network, Gray will not seek any fees from either operator for retransmitting any portion of WSAW-TV's signal outside of the Wausau-Rhineland DMA, and Gray reiterates that pledge here.²

The key benefit arising from Gray's Petition is that it would provide a copyright license to the satellite operators to distribute all of the copyrighted material embodied in WSAW-TV's broadcast signal to subscribers in both Ashland and Iron Counties. With certain exceptions not relevant here, the statutory copyright license under Section 122 of the Copyright Act only grants satellite operators a copyright license to distribute local broadcast stations in the station's "local market" as defined in Section 122(j)(2) of the Copyright Act.³

As it stands now, neither satellite operator can rely on Section 122 of the Copyright Act for a copyright license to distribute Gray's programming in Ashland or Iron Counties. Both counties are outside of WSAW-TV's "local market." Thus, even if Gray, DIRECTV, and DISH Network all agreed that Gray's programming should be retransmitted to subscribers in Ashland and Iron Counties, the Copyright Act makes it impractical to enter into a retransmission consent agreement for those out-of-market areas because the satellite operator would not have the necessary copyright licenses for Gray's programming. This is precisely the problem that Congress was attempting to solve with STELAR.⁴

STELAR provides a mechanism to modify a station's "local market" to ensure that satellite operators can obtain the critical copyright license to distribute programming when the public interest so demands. Under Section 102 of STELAR, the Commission has authority to grant a petition to add or delete certain communities from the local must-carry market of a commercial television broadcast station.⁵ Upon grant of such a petition, Section 204 of STELAR automatically updates the

² Contrary to the misinformed views of WDIO-TV, LLC and KQDS Acquisition Corp., Gray did not file its Petition to benefit WSAW-TV. Gray anticipates earning no additional retransmission consent revenue and no additional advertising revenue from carriage of WSAW-TV on satellite in these two rural, sparsely populated counties. Rather, as a public trustee of several television stations in Wisconsin, Gray believes it has a duty whenever feasible to solve problems identified by Wisconsin's elected leaders, such as the orphan county problem for Ashland and Iron Counties.

³ 17 U.S.C. § 122(a)

⁴ The STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)) ("STELAR").

⁵ STELAR § 102 (adding Section 338(l) to the Communications Act).

“local market” of the commercial television broadcast station for copyright purposes to reflect those newly added or deleted areas.⁶

Importantly, the Section 122 copyright license applies to all copyrights embodied in a station’s broadcast signal, including all subchannels. Nothing in Section 122 limits the statutory license to only a station’s primary channel or otherwise provides a separate license for individual subchannels. Moreover, nothing in Section 122 excludes copyrights from programming that happens to be simulcast on another television station. Rather, if a satellite operator has a statutory license, the license applies to all copyrighted material within the station’s signal without exception. Any contrary interpretation of the Section 122 copyright license would wreak havoc on the carriage of scores of multicast channels by satellite operators in markets across the country.

If the Commission grants the Petition, Section 204 of STELAR would provide the satellite operators with the necessary copyright license to retransmit in Ashland and Iron Counties any program stream within WSAW-TV’s broadcast signal, including any digital subchannel. As explained above, Gray then would grant retransmission consent for the satellite operators to do so. Therefore, modifying the local satellite market for WSAW-TV to include Ashland and Iron Counties would not create any issues under the Copyright Act or the Communications Act.

2. Explain the legal basis for us to consider the WZAW-LP simulcast stream in the context of the market modification for WSAW. Provide precedent in which the FCC considered the programming on a multicast stream in the market modification context.

The fact that WSAW-TV’s digital subchannel simulcasts the programming also aired by WZAW-LD is a plus factor for Gray’s Petition. Granting the Petition would provide the satellite operators with a copyright license to distribute WSAW-TV’s programming in Ashland and Iron Counties making it possible for Gray to bring to these orphan counties the locally-oriented programming from WSAW-TV’s primary channel (CBS) and WSAW-TV’s digital subchannel (Fox).

Although the FCC has not previously considered local programming aired on a digital subchannel in favor of a market modification case, it does not appear that a petitioner has ever asked it to do so.⁹ Regardless, nothing in the Communications Act prohibits the Commission from considering this relevant programming. Section 338(l)(2)(B) states that the Commission “shall afford particular attention to the value of localism by taking into account . . . whether the television station provides

⁶ STELAR § 204 (modifying Section 122(j)(2) of the Copyright Act to provide that the “local market” of a television station can be modified by the Commission in accordance with Section 338(l) of the Communications Act.)

⁹ In *WHIO-TV*, the FCC chose to disregard the local programming aired on the digital subchannel of a station that was *opposing* a market modification. See 28 FCC Rcd 16011, 16021 (2013). *WHIO-TV*, however, is inapplicable because in this case Gray is the proponent of the market modification and the programming on the digital subchannel is directly relevant to the public interest benefits from the Petition.

coverage or other local service to such community.”¹⁰ Notably, Section 338 does not ask “whether the primary channel of the television station” provides such local coverage. The Commission should not read restrictions into the statute that Congress did not impose or intend.

In any event, it is not surprising that the Commission did not consider programming aired on digital subchannels in prior market modification proceedings. To Gray’s knowledge, the Petition is the first request for a satellite market modification filed in accordance with STELAR. As a result, the only potentially relevant precedent would be from cable market modification decisions. But, when considering the lack of prior decisions, the Commission should also consider the fundamental differences between the Section 117 (cable) and Section 122 (satellite) copyright licenses.

The cable copyright license in Section 117 is broad and nationwide in scope. If a cable operator complies with the conditions in its statutory copyright license, the operator has significant flexibility to retransmit programming from out-of-market broadcast television stations. Thus, it is very common for cable operators to retransmit out-of-market broadcast stations without any need for special involvement from the Commission. By contrast, the satellite copyright license in Section 122 of the Copyright Act has a limited geographic scope. With exceptions not relevant here, satellite operators only have a license to distribute the copyrighted material within the television station’s “local market.” Thus, the Section 122 satellite license can act as an absolute bar to out-of-market carriage in a way that the Section 117 cable license does not.

Because of the more flexible cable statutory license, the primary focus of most cable market modifications is to obtain must carry rights in the pertinent communities. Digital subchannels are not entitled to assert must carry. Therefore, it is unlikely that the programming on a digital subchannel would be relevant in the vast majority of cable market modifications.

In the satellite context, however, programming on digital subchannels can take on added importance. In many satellite market modification proceedings, including Gray’s Petition, the primary goal may not be obtaining must-carry rights. Rather, the primary goal may be loosening the absolute bar on out-of-market carriage in the Section 122 copyright license, and this is precisely what Section 204 of STELAR was intended to do. In those instances, because the copyright license will also grant a license for programming on the station’s digital subchannels, that programming could be highly relevant to the public interest determination.

In this case, regardless of whether the Commission only considers programming from WSAW-TV’s primary channel (CBS) or if it also considers the locally-oriented programming on WSAW-TV’s subchannel (Fox), Gray has provided more than sufficient evidence to support the modification for WSAW-TV. As described in the Petition and in response to Question 3 of this response, Gray provides 25 hours per week of Wisconsin-focused local news on WSAW-TV’s primary channel (CBS). The programming on WSAW-TV’s subchannels only adds to the local programming that also would become available to residents of Ashland and Iron Counties, and nothing in the law precludes the FCC from considering these additional public interest benefits. Indeed, the FCC has long held that the list of market modification factors enumerated in the statute is not exhaustive and

¹⁰ 47 U.S.C. § 338(1)(2)(B) (emphasis added).

that additional information can be considered when appropriate.¹³ To that end, the possibility of bringing highly sought Green Bay Packer football games to these orphan counties to solve a problem that has vexed local residents and political leaders for more than a decade is exactly the type of additional information that the FCC should consider – particularly given the expansion of the FCC’s authority in STELAR to grant market modifications to remedy orphan county problems like the one at issue in this case.¹⁴

3. Separately identify the in-state and local programming carried by WSAW-TV (CBS) primary stream and such programming on the WZAW-LP simulcast stream.

As stated in Section III.B. of the Petition, WSAW-TV’s primary channel (CBS) provides local newscasts Monday through Friday from 4:30-7 AM, 12-12:30 PM, 5-5:30 PM, 6-6:30 PM and 10-10:30 PM; Saturdays from 6-6:30 PM and 10-10:30 PM; and Sundays from 7-8:00 AM and 10-10:30PM. WZAW-LD, the Wausau market Fox affiliate which is simulcast by WSAW-TV’s digital subchannel, airs a half-hour local news program on weeknights at 9 PM. Gray’s newscasts on WSAW-TV and WZAW-LD frequently include stories originating in the Orphan Counties.

Moreover, WZAW-LD frequently broadcasts games played by the Green Bay Packers (the only professional football team located in Wisconsin) when the Fox affiliate from the Duluth-Superior DMA chooses to instead air games played by the Minnesota Vikings, the archrival of the Green Bay Packers. As with all other programming on WZAW-LD, the Packer games also are simulcast on WSAW-TV’s digital subchannel.

4. Are cable systems in Iron and Ashland counties carrying WZAW or the WSAW Fox multicast stream?

Gray understands that WZAW-LD is carried in Ashland County on Packerland Broadband systems in Butternut and Glidden. In addition, Karban TV Systems carries WZAW-LD on its system in Mercer, which is located in Iron County. Gray does not know whether the cable operators receive WZAW-LD’s programming over the air directly from WZAW-LD or via WSAW-TV’s digital subchannel or via some other means (e.g., a third-party signal transport service). In any event, the carriage of the Fox programming stream pre-date’s Gray’s acquisition of WZAW-LD.

5. How many multicast streams does WSAW broadcast?

Gray broadcasts three digital subchannels within the signal for WSAW-TV. On the primary stream, Gray broadcasts CBS programming (digital subchannel 7.1). On the first multicast programming stream, Gray airs MyNetwork affiliated programming (digital subchannel 7.2). On the second

¹³ See Market Modifications and the New York Area of Dominant Influence, Memorandum Opinion and Order, 12 FCC Rcd 12262, 12267 at para. 10 (1997) (the “New York ADI Order”), *aff’d*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

¹⁴ See STELAR at § 102.

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multicast programming stream, Gray simulcasts the WZAW-LD programming stream (digital subchannel 7.3).

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Please inform the undersigned if you have any questions regarding these issues.

Sincerely,



Robert J. Folliard, III
Assistant Secretary
Gray Television Licensee, LLC

cc (via email): Evan Baranoff
Steven Broeckaert
Martha Heller
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